



Global Business Dialogue on Electronic Commerce

Consumer Confidence Alternative Dispute Resolution

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INTRODUCTION

Electronic commerce, especially between consumers in one country buying goods or services from businesses based in other countries, will grow unabatedly only if consumers feel confident that their interests are sufficiently protected in the case of disputes. At the same time, there is also the concern that merchants - especially small and medium sized enterprises (SMEs) - might be faced with unmanageable problems due to difficulties related to consumer disputes resulting from Internet transactions.

Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods or

services in dispute. If this were the only means to settle disputes, it would certainly not enhance consumer confidence in international electronic commerce and would strongly induce merchants to restrict the geographic scope of their offers. This, in turn, would limit competition and consumer choice.

Complete international harmonization of applicable laws and international agreements on competent jurisdictions might be the ideal solution in theory, but it is an illusion to believe that this can be achieved in practice.

There are widely differing views held among governments on the right type and level of consumer protection, even at the regional level of the European Union or the U. S., for example. In fact, recent legislation seems to be primarily

geared at shielding these various and often conflicting national or regional systems of consumer protection against growing international competition created by the Internet.

The situation is at least as difficult with regard to the issue of the competent forum. Business acknowledges that the application of the “country of origin” principle alone may not be sufficient to boost trust in online transactions, since consumers are unlikely to resort to the courts of other countries where merchants are resident. Conversely, the application of the “country of destination” principle (the residence country of the customer) is not the right answer either, since merchants will be unenthusiastic about international transactions that could subject them to a variety of differing country laws, processes and legal reach of every country in which their online customers may live. Moreover, for consumers this principle may only provide illusory protection, as in many cases the cost and complexity of cross-border enforcement stands in the way of effective redress.

Probably the best way out of this dilemma and an important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resort to courts.

In the offline world such alternative dispute resolution (ADR) systems are being used quite successfully as an effective, quick and efficient method for addressing consumer complaints that are not resolved through a simple contact with the company (in the framework of customer satisfaction systems) and there is already - at least in some parts of this world - some limited but positive experience with ADR related to business-to-consumer Internet transactions.

Through ADR, consumers’ concerns can be addressed fairly and in a timely manner. ADR allows both parties to avoid the delays and the costs of appealing to either a government administrative agency or the courts. In addition, the use of ADR avoids overburdening both

administrative and judicial systems (even when small claims courts exist), while at the same time, in general, preserving the consumers’ right to seek legal redress should they be dissatisfied with the results of the ADR process. Finally, ADR can be more flexible and creative in finding solutions that satisfy both parties, while consumer protection agencies and/or courts may offer only limited remedies in resolving disputes, particularly where those remedies are prescribed by law or regulations.

This GBDe paper has been written based on the practical experience of a vast number of companies and business associations, including private sector organizations offering online ADR systems, from all parts of the globe. Its content has been discussed and developed with contributions from governments and representatives of consumer organizations as well.

This paper makes recommendations to Internet merchants, ADR service providers and governments. Guidance is given for the use and development of ADR systems, and recommendations are put forward for government policy actions geared at meeting the requirements of business for effective ADR and creating high levels of consumer confidence in e-commerce.

DEFINITIONS

The term “Alternative Dispute Resolution (ADR)” in these recommendations covers all methods of resolving disputes related to obligations resulting from contracts concluded “electronically” (primarily over the Internet) between professional sellers of goods or providers of services and final consumers (B2C), operated by impartial bodies other than courts of law.

More specific distinctions within the ADR concept, such as “arbitration”, “mediation” and “conciliation/negotiation”, are often used interchangeably and without much precision. Such distinctions may, however, be of relevance

with regard to the role of the dispute settlement officer(s) in the process and the enforceability of the results.

“Arbitration” usually is a process whereby one or several independent arbiters invite the parties to submit the facts and their arguments (oral and/or written procedure) and finally decide on the basis of equity or law. Arbitration, by definition, is normally final and binding, and thus may not - in most cases - lend itself easily to the non-jurisdictional world of trans-border business-to-consumer transactions.

“Mediation” normally is a process whereby a mediator simply passes the proposal of settlement to the other party and the counterproposal back to the first party until the two have reached agreement. The mediator does not intervene in the negotiations but registers only the final agreement. When agreed to by both parties, the successful results of mediation are legally a contract and are enforceable in this capacity.

“Conciliation/negotiation” normally is a process whereby an independent conciliator actively guides the parties towards a fair compromise. This process does not develop in a legal vacuum, but need not investigate in detail the applicable law. The parties’ understanding of the legal rights and obligations (which may be conflicting) certainly plays a role, but equity might be the deciding factor. If the (final) conciliation proposal meets the agreement of both parties it becomes a contract and is enforceable in this capacity. If the parties do not agree on any compromise, they are free to go to court.

Purely internal dispute settlement services that are offered by merchants as an after-sale service rooted in good commercial sense, rather than as an alternative to court procedures, may not provide sufficient guarantees of impartiality to assure consumers that they will be able to obtain redress in the event of a disagreement over a transaction. Of course, wherever possible, direct business/consumer resolution is and will be the preferred instruments for solving customer complaints in B2C Internet transactions. These

services are referred to here as “customer satisfaction systems,” and they may become a step in the chain of redress, e.g. if customers wish to make use of ADR offered by the merchant, they may be invited to submit their complaint first to such a service (call centers, complaint services, etc.) before filing it with the ADR officer.

SCOPE

These recommendations deal exclusively with business-to-consumer (B2C) disputes in electronic commerce, where ADR is still relatively little known and practiced. Settlements of disputes resulting from business-to-business (B2B) transactions, both offline and online, will follow their own rules with a very high degree of party autonomy, mostly in the form of binding arbitration. The issues of consumer protection and consumer confidence are of no relevance in this context. Hence, there is neither a need to develop new recommendations for B2B ADR, nor would it be appropriate to address any issues related to B2B under the same parameters as B2C dispute settlements.

A survey of ADR systems for B2C Internet transactions already functioning or in the process of being established shows that most of them are established upon the initiative of groups of business companies (including auditing firms, banks, insurance companies, law firms), business associations, institutes (including universities), or consumer organizations, often as independent businesses. They cover their costs by sponsor and user fees, sponsors being normally those merchants that offer the services of this specific ADR system to their customers. In some instances they are also offered government funds, notably to function as pilot projects. Although only theoretical today, one should not preclude ADR systems being established by individual merchants, if a sufficient degree of impartiality is guaranteed.

The recommendations to business contained in this paper are addressed both to Internet merchants who signal to their customers that

they recommend submitting disputes to ADR, and to organizations that provide ADR as a service.

RECOMMENDATIONS TO INTERNET MERCHANTS

Encourage the use of in-house customer satisfaction programs

As a first and preferred remedy in any dispute, Internet customers should be offered access to in-house customer satisfaction systems. Depending on the type of transaction and the nature of the system, such approaches may serve as a valid alternative to ADR. For example, a merchant involved in the sale of low-priced merchandise might choose to offer an unconditional money-back guarantee to all customers rather than establishing an ADR system. In any event, it appears advisable to request that customers direct any complaint first to an in-house customer satisfaction system prior to taking advantage of any ADR mechanism.

Propose the possibility of ADR

Unless full customer satisfaction is guaranteed by in-house systems, customers of merchant websites used for B2C transactions should be notified that the merchant is ready to submit disputes resulting from online transactions to one or more specified ADR systems. Information about dispute resolution via ADR should be provided as a part of the overall information, perhaps in the framework of a reference to a code of conduct (Trustmark) or as a part of the general sales conditions.

Inform about conditions of ADR

Potential customers should be informed about the conditions of access (online or other), the cost (free of charge, nominal fee, cost borne by the merchant, etc.), the legal nature of the ADR (arbitration, mediation, conciliation, negotiation, etc.) and of its outcome (binding/not binding/binding for the merchant; enforceable),

and recourse to other instances, notably to law courts.

RECOMMENDATIONS TO ADR SERVICE PROVIDERS

Impartiality

The ADR personnel must be impartial, in order to guarantee that decisions are recognized as being made independently, thus strengthening the reputation and credibility of the organization providing ADR. Impartiality must be guaranteed by adequate arrangements, which may include measures such as the establishment of appropriately composed supervisory bodies or the appointment of dispute resolution officers according to specific criteria. Dispute resolution personnel must be insulated from pressure to favor merchants or consumers in resolving disputes. When the amount in dispute is important and/or when ADR is finally binding for both parties, even higher standards of transparency should be respected, including e.g. that the names of dispute resolution officers are made known to the parties, who should have the right to challenge them for cause.

Qualification of ADR officers

Dispute resolution officers should have sufficient skills and training to fulfill the function in a satisfactory manner. Formal lawyer qualification and license should not be required.

Accessibility and Convenience

ADR systems must be easily accessible from each possible country. Online access might be the preferred choice. Requirements about the form of the submission of a case should be kept to the necessary minimum. Customers should receive maximum guidance in filling in and filing submissions. Appropriate solutions must also be found for any problems that may result from different languages used by the merchant, the ADR service provider and the customer.

Speed

To be effective, ADR systems must resolve disputes quickly if they are to meet the needs of both consumers and businesses. In any case, they must be speedier than courts in providing satisfactory results.

Low cost for the consumer

The ADR service should be provided to the consumer at no or only moderate cost, while taking into account the need to avoid frivolous claims. An impartial screening process provided by the ADR system could do this. Prior submission of a complaint to a customer satisfaction program will also permit an early assessment of the real nature of the claim.

In fact, the cost of ADR will be significantly lower for both consumers and businesses than formal administrative or legal actions. This is particularly true when costs are calculated in terms of both time and money and where formal actions involve time-consuming depositions, hearings, legal representation, and personal appearances requiring international travel.

Transparency

ADR systems should function according to published rules of procedure that describe unambiguously all relevant elements necessary to enable customers seeking redress to take fully informed decisions on whether they wish to use the ADR offered or address themselves to a court of law.

To ensure credibility and acceptance of an ADR system, information should include:

- the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute;
- the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet (e.g. to attempt first to get redress through a customer satisfaction system

offered by the merchant), as well as other procedural rules, notably those concerning the written or oral nature of the procedure, whether it is conducted exclusively or partly online, whether oral hearings are possible or required (separate of either party or jointly), attendance in person or possibilities of representation, and the languages of the procedure;

- the decision-making arrangements within the body and its governing structure
- public listing of its personnel, the selection process of dispute resolution officers for individual cases and the possibilities of challenging them by the parties;
- the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure;
- the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.);
- the manner of proceeding, whether decisions are made public, confidentiality of the handling of submissions and of proceedings;
- enforceability of agreed upon resolutions and any other possibilities of recourse.

The ADR provider should publish an annual report enabling a meaningful evaluation of decisions taken, while respecting the confidential nature of specific case information and data.

Principle of representation

The ADR procedure should not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

Applicable Rules

One of the principal reasons why business, consumers and governments consider the development of ADR systems to be of such strategic importance for the enhancement of consumer trust in electronic commerce is that such systems can settle disputes in an adequate fashion without necessarily engaging in cumbersome, costly, and difficult research on the

detailed legal rules that would have to be applied in an official court procedure. Governments in particular, must be confident that the rights of both consumers and businesses are protected, while at the same time avoiding actions that could adversely impact the growth of global electronic commerce.

ADR dispute resolution officers may decide in equity and/or on the basis of codes of conduct. This flexibility as regards the grounds for ADR decisions provides an opportunity for the development of high standards of consumer protection worldwide.

Consumer Awareness

Except in special cases where both consumers and merchants find special circumstances to agree to arbitration (see below), consumers will not alienate their right to go to court by electing to use an ADR mechanism.

An arbitration decision taken by the dispute resolution officer(s) may be binding on the parties only if they were informed of its binding nature in advance and accepted this. Equally, the merchant shall not seek a commitment from the consumer to use binding arbitration prior to the materialization of the dispute, where such commitment would have the effect of depriving the consumer of the right to bring an action before the courts.

RECOMMENDATIONS TO GOVERNMENTS

Studies on the legal frameworks for ADR have demonstrated that they are fragmented between international conventions and legal instruments at several levels (federal/state, community/national, etc.). As a consequence, ADR systems conceived for worldwide application must respect a number of – not always compatible – conditions. Several of these elements can be easily accommodated, like the requirement that a valid agreement to submit a dispute to ADR would have to be entered into only after the dispute has arisen. Other elements

are more problematic to accommodate, e.g. that certain national laws on encryption or authentication inhibit the proper level of confidentiality and security in online proceedings, or that some national laws do not permit the conclusion of contracts online.

On the other hand, many governments are on record that they share the GBDe position that ADR is an essential element for the proper functioning of e-commerce and for the enhancement of consumer confidence in this medium. Hence, the GBDe expects governments to adopt policy stances in line with this goal.

International rules on competent forum and applicable law

Although ADR can provide appropriate solutions for many disputes, it must be recognized that even in the most ideal of worlds a certain number of disputes will still end up in court. Therefore, and also because these questions may still be posed in some ADR systems, the GBDe wishes to state clearly that questions of jurisdiction and applicable law in electronic commerce still need to be dealt with urgently and in a manner that encourages both business investment and consumer trust in electronic commerce. The GBDe position on this was expressed in the “Paris Recommendations” of the “Jurisdiction” Working Group in 1999.

Encourage the use of customer satisfaction systems and of ADR

Actively promote public awareness of ADR systems and their role in resolving business-to-consumer commercial disputes. Acknowledge the continuous efforts by companies to set up customer satisfaction systems, which should be used first before starting either ADR or court proceedings against a merchant. Likewise, policies should encourage consumers to use available ADR systems instead of or before seeking recourse to courts.

Education and Training

Support and promote educational activities of ADR officers by ADR system providers.

No discrimination between different ADR systems

Permit and promote the development of ADR systems by the private sector, without giving preference to public systems or discriminating between those offered by a third party, including consumer organizations, or by merchants or organizations of merchants directly. Achieving a sustainable level of competition among ADR providers and achieving reciprocal agreements among these should be a priority.

No mandatory criteria or accreditation systems

Refrain from imposing mandatory national or regional accreditation systems, or criteria for self regulation, or guidelines, which distort competition between national and international ADR systems. Consider requiring annual assessments of ADR programs operating in host countries. Promote the development of international self-regulatory principles and rules that could be the basis for merchants' and ADR providers' declarations of compliance.

ADR on the basis of equity or codes of conduct

Allow ADR systems to function on the basis of equity, or codes of conduct. It should not be required that dispute resolution officers necessarily have formal lawyer qualification and license. In some countries, mediation/arbitration processes are legally regulated to be conducted solely by licensed lawyers, but deregulation and an appropriate legal framework should be aimed for.

Global access to and application of ADR

Promote the development of globally applicable ADR systems, and take an international

perspective on ADR by working with other governments and international organizations.

Application of modern technologies in ADR

Refrain from creating obstacles for the innovative use of technology to settle consumer disputes and eliminate obstacles, resulting primarily from legislation on authentication and security, to the application of an appropriate level of confidentiality and security in online ADR.

Binding arbitration in business-to-consumer disputes should be possible in limited cases

Make it possible - in special circumstances - for consumers to subscribe, voluntarily, to binding arbitration excluding recourse to courts. This should not be the preferred standard clause in ADR agreements, but could be of interest to both consumers and merchants in certain cases of high-value and/or complex transactions.

Procedural and form requirements for ADR should be kept to a minimum

Eliminate requirements in some legislation that ADR must follow nearly the same procedural requirements, as the court system. The same applies to certain form requirements that may impede the use of ADR in the online context. The parties to an ADR case should be free to structure the proceedings, as they desire, as long as there is full transparency and information about the consequences.

Adjust offline ADR requirements to the online context

Remove inhibitions in national legislation or international conventions to conclude contracts - including dispute resolution clauses - online and adjust existing legal and political frameworks for offline ADR to online requirements.

Policy cooperation between public and private sector

Ensure close cooperation between the public and private sector to maintain a balance in achieving a satisfactory variety of ADR systems, which reflect consumer and business needs and are easily understood by the customer.